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**Citation for published version:**

Kumarasingham, H 2019, A foreign commission for domestic needs: The constitutional founding of Malaysia. in KYL Tan & N Son Bui (eds), *Constitutional Foundings in Southeast Asia*. 1 edn, Constitutionalism in Asia, Hart Publishing, London, pp. 139-160. <https://doi.org/10.5040/9781509918959.ch-006>

**Digital Object Identifier (DOI):**

[10.5040/9781509918959.ch-006](https://doi.org/10.5040/9781509918959.ch-006)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Peer reviewed version

**Published In:**

Constitutional Foundings in Southeast Asia

**Publisher Rights Statement:**

This is the accepted version of the following chapter: Kumarasingham, H 2019, A foreign commission for domestic needs: The constitutional founding of Malaysia. in KYL Tan & N Son Bui (eds), *Constitutional Foundings in Southeast Asia*. 1 edn, Constitutionalism in Asia, Hart Publishing, London, which has been published in final form at: <https://www.bloomsbury.com/au/constitutional-foundings-in-southeast-asia-9781509918928/>

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# A Foreign Commission for Domestic Needs: The Constitutional Founding of Malaysia

*H KUMARASINGHAM*

## Introduction

‘The calibre of the Commission will have to be very high, since the problems will be unusual and of great complexity’.<sup>1</sup> Thus stated the last British colonial High Commissioner in Malaya, Sir Donald McGillivray, when assessing the needs and demands a constitutional commission would be tasked with drawing up the constitutional foundations for an independent Malaysia. The constitutional founding of Malaysia is one of the more unique in British and Imperial constitutional history and McGillivray was not exaggerating in describing the situation as ‘unusual’. Not only was this the first major transfer of power in British Asia since the end of the Indian Empire a decade before, but it also confronted the constitution-makers with a complex polity enmeshed in rebellion, racial divisions, peculiar legal relations with Britain, esoteric governing structures, indigenous rulers with varying privileges, precarious geopolitical position and pronounced religious and ethnic sensitivities. Far from being a dry, pro forma and incidental body, the Federation of Malaya Constitutional Commission, better known as the Reid Commission, and its Report, were unquestionably critical and conspicuous in the constitutional founding of independent Malaysia. While it would be another eight years before modern Malaysia would appear – with the incorporation of North Borneo and Sarawak, and the exclusion of Singapore – the Reid Commission’s report laid the constitutional foundation for Malaysia when published in 1957. This chapter examines the constitutional context that led to the founding of independent Malaya. Malaya stands out in British colonial constitutional

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<sup>1</sup> AJ Stockwell (ed), *British Documents on the End of Empire – Malaya*, Pt III – The Alliance Route to Independence, 1953–1957, Series B, vol 3 (London: Her Majesty’s Stationary Office, 1995) at 227 [hereinafter ‘BDEEP’].

history as one of the most complex and unique constitutional founding moments, let alone in Southeast Asia.

The leading local actors were the indigenous rulers across the Federation jealous of their prerogatives and a pragmatic coalition between the major communal parties: United Malays National Organisation (UMNO), Malayan Chinese Association (MCA) and the Malayan Indian Congress (MIC). Despite this, Malaya sought an entirely non-local Commission to establish the constitutional identity for an independent state. As Lauren Benton and Lisa Ford noted in their work on international law and the nineteenth century British Empire, colonial commissions of inquiry have been largely eschewed by academics and have thus become a ‘grossly understudied constitutional moment’.<sup>2</sup> This essentially remains the case for the following century when the Southeast Asian states’ constitutions covered in this volume were framed. The Reid Commission provides for Malaysia this critical ‘constitutional moment’ that ushered in the constitutional character and complexion of the country.

## I Malayan Context

The Malay Archipelago since early times has been a region of deeply rooted governing traditions and experience of diversity in every sense. Melaka, especially, became the centre of the Malay world and had a rich cosmopolitan culture and a flourishing trading network and historically controlled most of the modern Malaysian peninsular and islands. The Sultanate of Melaka, as a commercial and cultural entrepôt, attracted significant migration not just from the Malay world, but also from across Asia. When the Sultanate fell to the Portuguese in 1511 the centre of the Malay world may have been lost, but its example, even if romanticised, remained as a template of kingship and governance. The *Sejarah Melayu* or *Malay Annals*, though written well after the fall of Melaka details a founding story of Malay kingship that successor regimes, both colonial and local, would try and emulate. As Harper states, they served as a ‘source of instruction’ and ‘enshrined the sanctity and authority, the *daulat*, of the Ruler’, which in turn help give cohesiveness to the state and foster Malay nationalist thought and their

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<sup>2</sup> Lauren Benton and Lisa Ford, *Rage for Order – The British Empire and the Origins of International Law 1800-1850* (Cambridge, Massachusetts: Harvard University Press, 2016) at 59.

authority and fitness in government.<sup>3</sup> This narrative remains critical to traditional authority in contemporary Malaysia and was openly prominent in the foundation of the state when Rulers' position and prerogatives were at the forefront of debate. European colonialism did not dismantle traditional rule. Instead, as will be discussed further below, the British were in favour of keeping traditional Malay governance roles and styles in place. As Harper argues 'the hallmark of colonial rule was the reinvention of traditional forms'.<sup>4</sup> Unlike some other traditional societies affected by colonialism the local Malay rulers largely not only retained their position, but also their influence on their subject culturally and constitutionally. However, while the Sultans were accepted as sovereign rulers, they had to admit – through a series of treaties – an on-the-spot British resident who had substantial powers. This was formalised in the 1874 Pangkor agreements that ensured British indirect rule in the Malay states. The Straits Settlements, which did not have Rulers, was administered directly by the British. Nonetheless Malay culture and practices permeated throughout. Even before it was formalised in 1957, the Malayan polity and constitutional culture contained what former Lord President of the Supreme Court, Salleh bin Abas, described as 'traditional elements': (a) the Sultanate or Rulership; (b) the Islamic religion; (c) the Malay language; and (d) Malay privileges.<sup>5</sup> The need for such constitutional and cultural considerations in the Malaysian founding was due to major demographic changes, the Malays were far from being the only community in the archipelago and sought protection of their status.

Migration caused a tremendous impact upon the composition of Malaya that would consequently affect the political bargaining surrounding the state's constitutional foundation. Colonialism accelerated the migration of various communities to the region. In particular, Chinese and Indian immigrants came to Malaya particularly from the nineteenth century as the British encouraged labourers specially to work on the plantations that were critical to the region's substantial commercial contribution to the imperial economy. The growth in economic

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<sup>3</sup> TN Harper, *The End of Empire and the Making of Malaya* (Cambridge: Cambridge University Press, 1999) at 15 [hereinafter 'Harper'].

<sup>4</sup> Ibid at 19.

<sup>5</sup> Mohd Salleh bin Abas, 'Traditional Elements of the Malaysian Constitution' in FA Trindade and HP Lee (eds), *The Constitution of Malaysia: Further Perspectives and Developments – Essays in Honour of Tun Mohamed Suffian* (Singapore: Oxford University Press, 1986) 1–17.

power of non-Malays and formation of political groups based on identity made many Malays fear for their position. So many of the colonial era confrontations were associated with tensions and violence between the Malays and non-Malays. The Malays were fearful of the growing permanence of the Chinese and Indian communities. While all had originally seen the migrant labour as being temporary, greater settlement in fact occurred due to economic and geopolitical reasons. In 1947 over 60 per cent of the so-called ‘immigrants’ had actually been born in Malaya.<sup>6</sup> This had major repercussions. With little inclination or capability of moving, this large non-Malay population would seek not only rights for their respective communities, but also participation and recognition in the foundation of the state.

## II Colonial and Constitutional Precursors

The founding of independent Malaya could have gone very differently. As the Japanese Occupation drew to its close, there were many ideas from Malays like Ibrahim Yaacob and Mustapha Hussain to craft a Malay constitutional polity before the British restored colonial rule. There was even vigorous support from certain Malay quarters to join an ‘Indonesia Raya’ or Greater Indonesia under Sukarno’s leadership of this pan-Muslim Southeast Asian creation. As the Japanese surrendered on 15 August 1945, plans were also afoot to announce a Malayan Democratic Republic with the Sultan Abdul Aziz of Pahang as its figurehead. However, Sukarno went ahead with Indonesian plans that did not include Malaya and British colonial rule re-emerged that scuppered these alternate ideas for Malaya’s constitutional founding.<sup>7</sup> Instead the British, in a secret planning session in Wimbledon, which CA Bayly and Tim Harper label one of the most thorough colonial documents for future constitutional reform in the Empire<sup>8</sup>, prepared the way for a Malayan Union, which would be more centralised and uniform than had been the case previously.

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<sup>6</sup> Harper (n 3), at 41.

<sup>7</sup> Christopher Bayly & Tim Harper, *Forgotten Armies: The Fall of British Asia 1941-1945* (London: Allen Lane, 2004), at 453–455.

<sup>8</sup> Ibid.

Sir Harold MacMichael, fresh from Palestine, was the His Majesty's Government's Special Representative in 1944. He determined that his mission would modernise governance in Malaya, and this involved each traditional ruler effectively surrendering his powers to the British Crown and then being offered direct and centralised British rule. Rather than help facilitate the path to self-government, MacMichael's strategy had the effect of alienating the Rulers as traditional allies and giving a spur to Malay and Malayan nationalism and this seeming reinvigorated attempt in British imperialism.<sup>9</sup> Sir Edward Gent, the first Governor of the Malayan Union, decided that the constitutional path lay in conciliation with Malayan interests rather than in diminishing them, especially considering their need of allies against the Malayan Communists. Nonetheless the Rulers were not appeased and boycotted his installation as Union Governor while senior Malay politician Dato Onn Jaafar and others in consequence of the so-called MacMichael treaties, formed the United Malays National Organisation (UMNO) in May 1946. That same month, Malcolm MacDonald was sworn in as Governor-General of Southeast Asia and made immediate overtures to the Rulers and Dato Onn to restore the sovereignty of the Malay Rulers and eventually create the Federation of Malaya in 1948.

As MacDonald reported to the Secretary of State, Malay opposition was not just from the Rulers, but 'comes strongly from Malayan democratic opinion as a whole'.<sup>10</sup> Malayan constitutional consciousness was very alive. New parties emerged and eventually, and crucially, Tunku Abdul Rahman took over the UMNO leadership in 1951 from Dato Onn who left to form his own party that same year. Both of these distinguished Malays hailed from aristocratic backgrounds. The Tunku's father was Sultan of Kedah while Dato Onn came from a long line of high officials in Johore. Dato Onn was the more complex and intellectual of the two. He had thought deeply about Malays and their place in a new Malaya. At times he could be pro-monarchy and an eloquent proponent of Malay nationalism while at other turned a fierce critic of the Sultans and prophet of the need to abolish communal feels and craft a united Malayan identity drawn from all communities. He also advocated that UMNO be open to non-Malays. The rejection of this idea caused him to leave the party. He also, unfashionably, was

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<sup>9</sup> Appointment of Special Commissioner in SE Asia, 13 Feb 1946, CAB 21/1954 and Local Reactions to the White Paper, 23 Feb 1946, CO 537/1581, BDEEP (n 1), vol 1, docs 71 and 72.

<sup>10</sup> Clyde Sanger, *Malcom MacDonald – Bringing an End to Empire* (Montreal: McGill-Queen's University Press, 1995), at 273–276.

not convinced by the demand for independence. Between 1945 and 1948 he repeatedly said *belum layak* (not yet ready) demonstrating his anxieties over the constitutional and political direction the Federation was heading.<sup>11</sup> His views also caused consternation with the Rulers, particularly with the Sultan Ibrahim of the State of Johore where he served on multiple occasions as Chief Minister. The Rulers effectively scuttled a British proposal to have a Malay as deputy high commissioner who most likely would have been Onn. Telling the UMNO youth wing in August 1949 that ‘the days of feudal rule are over’ and that we ‘are in the age of democratic and constitutional rule’ was unlikely to find favour with the Malay monarchs some of whom had already expressed contempt for the idea of popular democracy and elections.<sup>12</sup> While wanting to promote the Malays he also strived to broaden the movement to reach out to the non-Malays. As Bayly and Harper argue, Onn was moving too far ahead of Malay opinion.<sup>13</sup> These points and others caused him to split from UMNO and leave its leadership to the more relaxed Cambridge-educated Tunku who not only was more sensitive to the position of the Rulers, but accepted the special place of Malays in any constitutional structure albeit while in *alliance* with the other communities.

Many from the British side sought to dampen expectations of rapid self-government. Lord Killearn, Special Commissioner to South East-Asia since 1946, believed too much had been determined by the need to provide a regulation map for the path to independence. This, he argued, only made local ‘irresponsibles’ think that constitutional advancement was ‘the panacea for all ills’. A few years later in 1949 officials in the Foreign and Colonial Offices believed that Malaya could only expect self-government in up to 20 years and not the eight that eventually occurred.<sup>14</sup> Nonetheless, Labour ministers like James Griffiths and John Strachey and their Conservative successors like Oliver Lyttelton and Alan Lennox-Boyd came to see the lessons from India and the need to ensure a swifter and more co-operative style self-government to maintain not only peace and order, but also protect British interests through

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<sup>11</sup> BDEEP (n 1), Pt I, at lxxix.

<sup>12</sup> Joseph M Fernando, *The Making of the Malayan Constitution* (Kuala Lumpur: MBRAS, 2002), at 12.

<sup>13</sup> Christopher Bayly and Tim Harper, *Forgotten Wars – The End of Britain’s Asian Empire* (London: Penguin, 2007), at 502.

<sup>14</sup> Frank Heinlein, *British Government Policy and Decolonisation 1945-1963 – Scrutinising the Official Mind*, (London: Routledge, 2002), at 51–53.

cooperation with a local leadership they could work with, as opposed to the potential of a Communist or Nationalist regime who would surely break down crucial defence and economic edifices that Britain relied upon.<sup>15</sup> Malaya accounted in 1951 for just under 10 per cent of Britain's world exports and a valuable defence pivot in its Asian ambitions.<sup>16</sup> For the traditional Malay leadership there was also interest to maintain good relations since the very Communists and Nationalists the British wanted excluded were also keen to throw off the feudal government and society of the region, which the British had enabled, and replace with 'true democracy'.

The Pusat Tenaga Rakyat (or PUTERA) sought the end of class and communal division and instead the unity of all Malaysians.

The People's Constitution of PUTERA is based on election, *kedaulatan rakyat* [sovereignty of the people], and moves towards social justice, and egalitarianism, without upper and lower classes in the *bangsa* [nation] except according to the capability, intelligence and industry of the individual. We hope in this matter the *rakyat* no longer have any doubts, but instead have more faith in the struggle and loyalty to their respective movements. Because of this we appeal once more, struggle onwards with a fiery spirit, but cool head until the sacred aims that we aspire to are achieved. Remember, comrades, that the world is changing fast and we cannot live with the understandings and feelings that we had in the year 1941. We are now in the year 1947 in the atomic age, the old era has passed.<sup>17</sup>

The All-Malayan Council of Joint Action founded in 1946–47 which brought together Malay radicals, Chinese Kuomintang, Communists, Leftists, Businessmen, Englishmen and others proposed a 'People's Constitution'. For many in this disparate group the goal was to create a constitution founded on common citizenship, but without individual conformity and to wrest power away from the British and their interlocutors in the Malay leadership. The British and UMNO under the Tunku largely ignored this constitutional populism and the organisation became riddled with division and was unable to provide a realistic constitutional alternative for a sovereign Malaya.<sup>18</sup>

The Tunku's UMNO eventually joined with the MCA in 1952 and later the MIC to form the Alliance party to contest elections and demonstrate inter-communal cooperation. The

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<sup>15</sup> See, eg, Ronald Hyam, *Britain's Declining Empire – The Road to Decolonisation 1918-1968*, (Cambridge: Cambridge University Press, 2006), at 156–160 and 198–201.

<sup>16</sup> Bayly and Harper, *Forgotten Wars* (n 13), at 408.

<sup>17</sup> Ibid, at 517.

<sup>18</sup> Bayly and Harper, *Forgotten Wars* (n 13), at 361–371



British had made it clear, perhaps with a mind to other parts of Asia, that political cooperation and accommodation between the three main communities was a necessity to achieve independence.<sup>19</sup> The Alliance fitted this requirement and its ethnic components, by and large proved practical and sensitive to their separate needs, while keeping the common goal of *merdeka* to the fore. The 1955 federal elections were the first real test for this constitutional concert party. The level of success of the Alliance coalition in the 1955 general elections surprised even the Tunku. The Alliance won every single elected seat except in Krian, Perak, – which was almost entirely populated by Malays – went to the Pan Malayan Islamic Party. The Alliance's great rival Dato Onn and his Party Negara were prevented from providing any opposition to the Alliance vision since they were unable to gain any representation in the legislature. With 51 of the 52 elected seats, the *Straits Times*, previously a critic, predicted that the Alliance's victory 'probably unparalleled outside the totalitarian countries' will allay 'doubts and fears' and produce 'a wholesome effect in that a strong, stable government can be formed, which can be sustained solely by its electoral strength'.<sup>20</sup> A point that would clearly reinforce the Tunku's independence objectives. The victory also served to achieve, electorally at the least, evidence of cooperation among the Malay, Chinese and Indian communities, which was a critical condition for the British to transfer power. Though, as with all elections, the results could be deceiving. Malays constituted 84 per cent of eligible voters despite their population being nowhere near that amount numerically in the Federation. The Chinese for example while comprising about 40 per cent of the population only made up 11 per cent of eligible voters of which only an estimated eighth voted. Only 5 per cent of registered voters were Indian. Nonetheless the Alliance came away with 79.6 per cent of the popular vote.<sup>21</sup>

The British and Malayan leadership resolved early in 1956 at the London conference that 'self-government and independence within the Commonwealth should be proclaimed by

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<sup>19</sup> Fernando, *Making* (n 12), at 37.

<sup>20</sup> Joseph M Fernando, *The Alliance Road to Independence* (Kuala Lumpur: University of Malays Press, 2009) at 101.

<sup>21</sup> Francis G Carnell, 'The Malayan Elections' (1955) 28(4) *Pacific Affairs* 316.

August 1957, if possible'.<sup>22</sup> As Stockwell recounts the constitutional and political hurdles to surmount in just over a year from those talks were formidable to forge an independent state.

The mass of business to complete before that included the following: drawing up the independence constitution and defining citizenship and nationality; negotiating the defence agreement; working out financial provisions; settling the peculiar problems of Penang and Malacca; reaching a decision on the question of appeals to the Judicial Committee of the Privy Council; reaching terms for expatriates, pushing ahead with Malayanisation and establishing the public services commission; selecting Malaya's head of state and designating Malayan governors for Penang and Malacca; submitting an application for Commonwealth membership; and preparing for independence celebrations. The pace of business was breathtaking.<sup>23</sup>

To this bewildering array of issues and objectives Stockwell adds that with such needs in so short a time there was, inevitably, 'controversy, tension and dispute'.<sup>24</sup> To this context arrived a constitutional commission full of ethnic diversity, legal expertise, jurisdictional breadth, and slight, if any, knowledge of the country they were tasked to prepare a constitution for.

### III Constitutional Commission

Less than a month after his landslide victory, the Tunku wrote to Lennox-Boyd arguing the need for the appointment of a constitutional commission whose overseas members would come 'preferably from the Commonwealth countries'. The Tunku then outlined the some of his reasons.

In our opinion, only such a Commission would be able to exercise complete impartiality in the inquiry into the Constitution. We feel confident that the Commission composed of members, rich in experience of constitutional and political matters, would be able to bring a fresh approach to the problems of our country. They would be able to produce an unbiased report on the constitutional reforms which will fit this country for full responsible self-government and independence in the shortest time possible.<sup>25</sup>

The Alliance had said as much in their 1955 election manifesto. This would be mean that unlike India Pakistan, Burma, Ceylon and Ghana, all recent cases of states that had gained

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<sup>22</sup> *Report by the Federation of Malaya Constitutional Conference*, Cmnd 9174, London: 1956.

<sup>23</sup>

<sup>24</sup> BDEEP (n 1), s Pt I, p lxxvii.

<sup>25</sup> *Ibid*, Pt III, p 154.

independence from Britain, the Alliance preferred to wholly place their constitution framing in the Commission composed entirely of those drawn from outside their land. The Rulers did not initially share the Alliance's opinion as they expressed preferment for a Malayan body with possibly a British chair.<sup>26</sup>

The Alliance had already contacted the governments of Australia and Canada about their participation in the Commission; even outlining the possibility of an Australian chair.<sup>27</sup> In Britain various names were mentioned for two members from Britain, one of whom would be the chair. The Colonial Office originally wanted the former Lord Chancellor, Lord Simonds, but eventually the former Solicitor-General for Scotland and Lord Advocate, Lord Reid, was selected. Australian justice Michael Kirby, in an analysis of 50 years of Malaysia's Constitution, said that Reid was 'one of the greatest jurists of the century in the English-speaking world'.<sup>28</sup> Sir Kenneth Wheare and Nicholas Mansergh, Commonwealth constitutional scholars in Oxford and Cambridge respectively, were considered, but eventually the Tunku's old friend from his days as a student in St Catharine's, Cambridge, Sir Ivor Jennings, was selected in spite of certain Colonial and Commonwealth Relations Office opposition to a man who had long troubled them since his days in Ceylon.<sup>29</sup> Australia drew many different names, but in the end Robert Menzies recommended his former political rival Sir William McKell to the Commission.<sup>30</sup> The former boilermaker and Australian governor-general had served as Labour premier of New South Wales who had trained as a barrister. Canada's nomination fell through due to personal circumstances and was not replaced.<sup>31</sup> India provided Bidhubusan

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<sup>26</sup> Fernando (n 12), at 103.

<sup>27</sup> Ibid, at 104.

<sup>28</sup> Kirby quoted in HP Lee, *Constitutional Conflicts in Contemporary Malaysia* (Kuala Lumpur: Oxford University Press, 1995), at viii.

<sup>29</sup> H Kumarasingham (ed), 'Introduction', *Constitution-Maker – Selected Writings of Sir Ivor Jennings* (Cambridge: Cambridge University Press, 2015).

<sup>30</sup> Australian legal experts that were discussed to be on the Reid Commission included the Solicitor-General Sir Kenneth Bailey, law professor Zelman Cowen, and judges Sir John Latham, Sir Owen Dixon, Sir Alan Taylor, Sir Wilfred Fullagar, Sir Ned Herring, and Sir Reginald Sholl.

<sup>31</sup> Kumarasingham (n 29).

Malik, a former Chief Justice of Allahabad. Pakistan recommended Justice Abdul Hamid who had once served as Secretary to the Law Ministry in West Pakistan, and who knew Jennings from his time advising in Karachi. Upon hearing of Hamid's appointment, Jennings wrote to the Colonial Office official Sir John Martin:

I am glad that Pakistan has at last appointed Abdul Hamid: indeed, it is not easy to understand why it took so long. He is a cautious and precise lawyer, a little conservative and sometimes very obstinate. He can draft but not write. His great advantage, for present purposes, is that his only grievance against H[er] M[ajesty's] G[overnment] is that it walked out in 1947. Like many of the Pathans, he prefers the Queen-Empress to the Punjabi politicians. I hope India does us equally well, though since Hamid is a very orthodox Muslim it would be best to have a Hindu—two Muslims might frighten the Chinese.<sup>32</sup>

The Terms of Reference for the commission provided key institutional and political parameters that shaped the intentions and realities of Malaysia's constitutional independence.

To examine the present constitutional arrangements throughout the Federation of Malaya, taking into account the positions and dignities of Her Majesty The Queen and of Their Highnesses the Rulers: and To make recommendations for a federal form of constitution for the whole country as a single, self-governing unit within the Commonwealth based on Parliamentary democracy with a bicameral legislature, which would include provision for: (i) the establishment of a strong central government with the States and Settlements enjoying a measure of autonomy (the question of the residual legislative power to be examined by, and to the subject of recommendations by the Commission) and with machinery for consultation between the central Government and the States and Settlements on certain financial matters to be specified in the Constitution; (ii) the safeguarding of the position and prestige of Their Highnesses as constitutional Rulers of their respective States; (iii) a constitutional Yang di-Pertuan Besar (Head of State) for the Federation to be chosen from among Their Highnesses the Rulers; (iv) a common nationality for the whole of the Federation; (v) the safeguarding of the special position of the Malays and the legitimate interests of other communities.<sup>33</sup>

As the above indicates and along with the discussions emanating from the London Conference previously, the Commission's objectives were relatively clear. As Harding argues 'Its task was perceived therefore not so much as a political exercise as the translation into legal and practical terms of that which was already politically settled'. As such the members were chosen for their political and constitutional expertise instead of experience of Malaya, which with the exception of Jennings' university work there, was almost entirely absent.<sup>34</sup>

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<sup>32</sup> Jennings to Martin, 1 June 1956, CO 1030/130.

<sup>33</sup> The Colonial Office, *Report of the Federation of Malaya Constitutional Commission 1957*, no. 330 (Reid Report).

<sup>34</sup> Andrew Harding, *The Constitution of Malaysia – A Contextual Analysis* (Oxford: Hart, 2012) p 31.

Another side to the unusual nature of having a Commonwealth constitutional commission without local participation is that Malaya did not feel the need to follow the precedent of India or Pakistan a decade earlier and convene a constituent assembly for local representatives to debate, research and prepare a constitution. Andrew Harding believes this constitutional evasion was a mistake.

Although this enabled independence to be reached probably sooner than otherwise have been possible, and although the Commission consulted widely and sympathetically and the Reid Constitution was accepted by all the relevant institutions in Malaya, the Malaysian Constitution has probably suffered from the fact that it was not drafted by the representatives of the people. It has often been seen or presented as a foreign document rather than an indigenous one. A more democratically chosen body would, undoubtedly, have come up with radically different recommendations.<sup>35</sup>

This perspective opens the charge that the constitution was not, in KC Wheare's famous characterisation autochthonous, 'sprung from the land itself'.<sup>36</sup> However, the involvement, preferment and sanction of the Alliance, drawing as they did from not only a massive legislative dominance, but also representing the three main communities of Malaya with the active distinction that the Commission formally derived its authority from the Malay Rulers (as well as the Queen) did illustrate not insubstantial indigenous influence and conditions in its creation and context. Whatever else, as Sir David Watherspoon, Chief Secretary of Malaya put it, the Commission's actions and plans seemed to 'be singularly fluid'.<sup>37</sup>

## IV Commission Deliberations

The Commission held 118 meetings and considered 131 memoranda and took evidence from diverse groups and individuals across the breadth of Malaya. Nonetheless the style and saunter of the Commission raised questions. Lord Reid and his wife, 'the eminence grise', as Jennings called her, did not always endear themselves to the Commissioners with Lady Reid's insistence on remorseless protocol and leisurely pace of travel and work. As Jennings remarked 'What the deuce is the good of our sitting in our chalets reading papers, when the Malaysians are all

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<sup>35</sup> Andrew Harding, *Law, Government and the Constitution in Malaysia* (London: Kluwer Law International, 1996), at 29.

<sup>36</sup> KC Wheare, *The Constitutional Structure of the Commonwealth* (London: Oxford University Press, 1960), p 89.

<sup>37</sup> CO 1030/132, 3 August 1956.

around us?’<sup>38</sup> Reid, Hamid and Jennings in particular were the most influential members of the Commission with Jennings alone preparing most of the working papers on subjects such as federal-state relations, elections, the monarchy and economic development.<sup>39</sup> He was also often caustic about the deficiencies of his fellow members – at one point commenting that Reid was ‘using the tricks of a small-town lawyer’ or that ‘There is no doubt that Malik is out of his intellectual environment. He is rather a stupid fellow, third class in ability and fourth in imagination’ while McKell was out ‘lunching with Australians’.<sup>40</sup> Occasionally, however, Jennings recognised the value of the Commonwealth crew.

Lord Reid himself has done a lot of work on the drafts and his criticisms are always acute. He is unfortunately prejudiced by an emotional sympathy with the Rulers; but he might not unreasonably complain that McKell and I have an emotional antipathy to the Rulers. I must confess that I have no very high opinion [of] Tunkus, except Abdul Rahman, who is noteworthy for his plain common sense. On these matters McKell supports me and I support him. Nevertheless, Lord Reid has been a most effective critic of my drafts, which have generally been improved by him. His draft Report, too, is very sensible, and I have not found much in it to criticise – though I have not done very much on the Report, because my main job has been to produce the Draft Constitution.<sup>41</sup>

The real tension, however, was between Justice Hamid and the others. Hamid saw himself as a defender of the Malays and protector of their faith. Hamid argued to his fellow Commissioners:

The new Constitution confers citizenship rights on a very large number of non-Malays and in the course of a very short time non-Malays will outnumber the Malays on the electoral roll and will be in majority in the legislature. The protection which a majority in a legislature enjoys will not be available to them for long.<sup>42</sup>

He wanted stronger wording of the already agreed provisions for Malays including the provision of 15 years of protection be extended indefinitely and that the Yang di-Pertuan Besar as head of state have discretionary responsibility to safeguard the privileges of Malays, especially if future demographics placed the Malay people as a minority within the legislature.

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<sup>38</sup> Kumarasingham (n 29), at 59.

<sup>39</sup> Joseph M Fernando, ‘Constitutionalism and the Politics of Constitution-Making in Malaya, 1956–1957’ in Kumarasingham (ed), *Constitution-Making in Asia: Decolonisation and State-Building in the Aftermath of the British Empire* (London: Routledge, 2016), at 142–143.

<sup>40</sup> Kumarasingham (n 29), at 69–72.

<sup>41</sup> Ibid, at 70.

<sup>42</sup> B10/6, Sir Ivor Jennings Papers, ICS 125, Institute of Commonwealth Studies, University of London (henceforth Jennings Papers)

The Commission members mostly recoiled at this proposal since many saw that this could transform a constitutional head of state into something more powerful and one that could act without advice or support from the government.<sup>43</sup> The Commission members were particularly incensed that Hamid was returning to issues that not only had they thought settled, but in many cases, such as Articles 82 and 157, where Hamid had actually drafted the special position of Malays. Jennings eventually had a showdown with Hamid.

At dinner I told Hamid that I was going to draft a violent attack on him as our draft reply to his Note, and that I was going to do it in defence of the people of Malaya, of the Federation Government, and in particular of my friend Tunku Abdul Rahman... This morning at 9.30 a.m. (2nd Feb) Hamid said that he saw the force of my argument. If anything said by him were to prevent the people of Malaya from living and working together as a band of brothers he would be a very great sinner. He wanted to do everything he could to help, but he feared that it might not work, so he wanted some protection for the Malays, who have been very generous and deserved protection... I then asked Hamid if he was prepared to risk a riot by inserting all this political dynamite merely for a few quotas. Lord Reid broke in and said: "Hamid, do you realise that if this goes in, the blood of thousands of people may be on your hands? Will you not remove all this and merely express your dissent on Quotas on the simple basis that you do not think the protection goes far enough?"<sup>44</sup>

Hamid was able to include his note of dissent, but largely the issue of the Malay special position was settled by the Alliance when they had a chance to respond to the report. The Tunku was able to ensure through his personal sincerity and relationships with the MCA and MIC leadership compromises that upheld the special Malay position with clear undertaking that their languages and schools could continue to operate.

Interestingly the Assistant Secretary to the Commission, K J Henderson, believed that personal dynamics rather than pure intellectual differences had bedevilled the Commission's outcome and unfortunate dissent. It was reported to the Colonial Office that 'The Commission's report reflects the disharmony which prevailed throughout, and which I think we cannot but ascribe to the absence of real leadership. I think we must be profoundly grateful that the report is as good as it is'.<sup>45</sup> The minute continued that it was Henderson's impression that:

the Commission had finished up completely at loggerheads with each other, largely because of the extraordinary behaviour of the Reids who had set an example of self-concern and had been utterly and consistently inconsiderate not only of the staff of the Commission but of the other members. Mr. Henderson was quite certain that Mr. Justice Hamid's insistence at the last

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<sup>43</sup> Ibid, at B 10-7-3, Jennings Papers.

<sup>44</sup> Kumarasingham (n. 29) at 74.

<sup>45</sup> BDEEP (n 1), vol 3, 443 doc.

minute on producing a minority report was little more than an attempt to assert himself after his opinions and views had been consistently brushed aside by Lord Reid during the Commission's time in Malaya. The rudeness with which the Reids visited almost everyone with whom they came in contact is scarcely credible.<sup>46</sup>

## V Ruling and Reigning

In many ways, the Reid Commission's report not merely preserved, but enhanced the status and powers of the Malay Rulers. As such the power of people and power of the Rulers at independence arguably muddled a clear sense of who truly safeguarded the representation of Malays. Were the Rulers with their religious and cultural significance the traditional defenders of the Malay people or was it the newly elected government with electoral backing? The Reid Commission and the independence settlement, as Simon C Smith contends, by 'consolidating the position of the Rulers...ensured that the issue of where sovereignty resides has remained contentious' ever since.<sup>47</sup> Some submissions to the Commission were deeply concerned about the potential for Sultanic aggrandisement that might arise with the entrenchment of the Rulers into the Constitution. The Labour Party of Malaya, which contained Chinese and Indians, for example, believed that the Alliance as the 'Party of Privilege' had by 'skilful propaganda' convinced the Malays that their own fortunes were identical to the Malay Royals. Labour therefore believed that in deference to the Malays the Sultans would be able to become constitutional monarchs, but on their death, a 'referendum' would occur among the entire population to gauge whether the monarchy should remain. Even more radically they believed the country should have a head of state elected from the federal and state legislatures called a President (though they did not explicitly state that this would mean a republic). The Alliance idea of election among the Rulers for the top post would be 'retrograde' serving only the interests of the 'ruling clique' and 'not compatible with present democratic trends in South-East Asia.'<sup>48</sup>

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<sup>46</sup> Ibid.

<sup>47</sup> Simon C Smith, 'Moving a Little with the Tide': Malay Monarchy and the Development of Modern Malay Nationalism', (2006) 34(1) *Journal of Imperial and Commonwealth History* 133.

<sup>48</sup> B 10-7-3, Jennings Papers



As discussed earlier, many groups, including in the Colonial Office, felt the British Crown should maintain a presence not only to protect the ‘Queen’s Chinese’ for example, but especially in the Straits Settlements, where no Malay ruler presided. Ideas included having the Queen represented in Penang and Malacca by a Governor or Lieutenant-Governor, who in turn would hold a position similar to Rulers in the states. The Federal monarch, it was suggested, would not only be Yang di-Pertuan Besar, but also Governor-General as in the Dominions. Even the high imperial title of Viceroy was mooted by the Colonial Office.<sup>49</sup> The High Commissioner, Sir Donald MacGillivray, while acknowledging that groups like the Chinese may prefer to keep the British Crown in some capacity in the Straits Settlements, overall felt this idea a dangerous one. Aside from the difficulty of finding a constitutional formula that would could work where the Queen would at one level share sovereignty with the Malay monarch at the centre, but also be subordinate at the state level, there would be major presentational and political concerns that would render the Queen as part of the Constitution of independent Malaya problematic. Malaya would become the first state to begin independence within the Commonwealth and not be a Dominion thus eschewing a constitutional place for the Queen. It was also the first indigenous and independent monarchy within the Commonwealth. MacGillivray believed however nominal the Crown’s role would be it would lay the charge that Britain was still engaged in colonialism and that the sovereignty of the state would be in question by being thought of as still being ‘governed’ by the British. Not only would there be speculation about British ‘intrigue and interfering’, but those Malays with ‘jealous nationalism’ would potentially recoil at the thought of a British Governor in Malacca since that area was ‘the seat of the original kingdom of the Malays’ and centre of symbolically pre-European Malay culture and history.<sup>50</sup> The Reid Commission came to see this view too after meeting groups around the Federation. Indeed they supported this position despite senior officials on the Colonial Office saying explicitly that they ‘excluded’ the ‘possibility of advising the Queen to cede her rights and abandon her sovereignty in the two Settlements’ and ‘hope[d] the Commission will seriously recommending this’.<sup>51</sup> The Queen of

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<sup>49</sup> Memorandum, CO 1030/132, 21 Mar 1956.

<sup>50</sup> MacGillivray, CO 1030/132, 19 Jul 1956.

<sup>51</sup> JB Johnston CO 1030/132, 20 Jun 1956.

the Straits Settlement in post 1957 Malaya was to be in a position not unlike the residual constitutional extensions she maintained following independence in South Asia.<sup>52</sup>

## VI Rights for the Individual or Rights of the Community

Malaya had always been a place where different cultures and communities lived. The Malayan Chinese leader Tan Cheng Lock and others saw themselves just as much ‘sons of the land’, as the Malays called themselves. For Tan Cheng Lock, for example, who traced his family’s roots in Malaya from 1771, he was a ‘true *anak Malaka* [ son of Malacca]’. This major political figure spoke of Malaya’s need to craft a moderate nationalism with democratic and ethnic unity.

We in Malaya have adopted and want to apply the dynamic conception of nationalism and democracy. Nationalism, if it is to be unifying force, requires the elimination of communalism from political life. Democracy demands for it free operation an understanding of the conflicting claims of race and language and a willingness to compromise on major political issues after full and free discussion.<sup>53</sup>

Tan Cheng Lock grew increasingly frustrated at the Chinese not being viewed as full and valued members of Malayan society. Nonetheless he recognised that only ‘when the Chinese acknowledge the same sovereigns as the Malays do, can they demonstrate their wish to the equals of the Malays’.<sup>54</sup> This in some ways was discussed earlier and would see constitutional light. A proposal in 1949 began to emerge based on technical provision in the Nationality Bill of Johore whereby a subject of the ruler automatically became a federal citizen. Could this, it was suggested, see the Chinese included?<sup>55</sup> At the time there were reservations, but the new state would see a new sense of loyalties and responsibilities emerge for all the political actors. The relationship between Malays and non-Malays lay at the heart of the

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<sup>52</sup> See H Kumarasingham, ‘The ‘Tropical Dominions’ The Appeal of Dominion Status in the Decolonisation of India, Pakistan and Ceylon (2013) 23 *Transactions of the Royal Historical Society* 223–245.

<sup>53</sup> Bayly and Harper, *Forgotten Wars* (n 13), at 365.

<sup>54</sup> Ibid, at 503.

<sup>55</sup> Ibid, at 501–502.

predicament of the Commission. The Malay leadership felt that their historic position warranted constitutional protection and promotion.

UMNO in their memorandum produced the following guidance on the need for special 'privileges' for Malays.

While we accept that in independent Malaysia, all nationals should be accorded equal rights, privileges and opportunities and there must not be discrimination on grounds of race or creed, we recognize the fact that the Malays are the original sons of the soil and that they have a special position arising from this fact, and also by virtue of the treaties made between the British Government and the various sovereign Malay States. The Constitution should, therefore, provide that the Yang di-Pertuan Besar should have special responsibility of safeguarding the special position of the Malays. In pursuance of this, the Constitution should give him powers to reserve for Malays a reasonable proportion of lands, posts in the public service, permits to engage in business or trade, where such permits are restricted and controlled by law, Government scholarships and such similar privileges accorded by the Government; but in pursuance of his further responsibility of safeguarding legitimate interests of the other communities, the Constitution should also provide that any exercise of such powers should not in any infringe the legitimate interests of the other communities or adversely affect or diminish the rights and opportunities at present enjoyed by them.<sup>56</sup>

Abdul Razak was questioned on the position of Malays in the future Constitution and the UMNO's policy that the language and position of the Malays be protected. Reid was especially interested in how this would affect non-Malays. Razak replied that 'We do not want to reduce the legitimate interests of the others. What we have in mind is not to give Malay special rights by taking away the legitimate rights of other people'. While Reid accepted this argument he pointedly qualified it by stating that 'every additional privilege is, to some extent, prejudicing the others because it is limiting the amount of land or the number of jobs they could get and so on'.<sup>57</sup>

Intentionally or not, mention of a 'large alien population' threatening the 'interests of national unity' was unlikely to find favour with the wider Chinese and Indian community across the Federation.<sup>58</sup> On being pressed on why dual nationality was a problem for UMNO the Tunku stated that:

For a new nation, it will be rather troublesome later. It is all right for an established or old nation; it can make all sorts of laws. But, at this moment, our main interest is to try and bring these people towards one common nationality and that is the reason why we have provided in

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<sup>56</sup> CO 889/6

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

our terms of reference that that be a common loyalty, so that loyalty of the people shall not be divided. They shall be Malaya alone.<sup>59</sup>

For these communities not only was recognition of their right to reside important, but also the right to publicly express their language. Language, of course, proved to be a major issue. Proposals to instil qualifications for Malayan nationality based on proficiency of English or Malay, which would in turn determine languages accepted in the legislature, raised concerns particularly among the Chinese community who feared that this would ‘mean depriving a large number of these Chinese nationals of the right to stand as candidates.’ Lord Reid’s response that the ‘Chinese are pretty able people’ who could learn English or Malay ‘pretty easily’ did not placate them. Justice Malik, however, with his experience of polyglot and republican India’s legislative acknowledgement and parliamentary procedure that recognised other languages beyond English and Hindi, which he argued could work in Malaya was more ‘acceptable’ as well as understanding of the linguistic pluralism.<sup>60</sup> UMNO appreciated this too and did not press a ‘Malay Only’ condition as their majority community Sinhalese counterparts were doing in Ceylon with the Sinhala Only Act that same year, which made Sinhalese the sole official language sowing the seeds for the ethnic conflict that would consume Sri Lanka.<sup>61</sup>

Interestingly the Sinhalese and Tamil communities in Malaya submitted memoranda to the Commission, which argued for the special protection of their own languages and community. Perhaps the recent developments that very year in Sri Lanka that removed the Tamil language from being officially recognised throughout the country motivated the Malayan Tamil Pannai to record its service and history of the Tamil people in Malaya and passed on the resolution of its members that:

The New Constitution of the Federation of Malaya should guarantee the preservation of the respective racial languages and cultures which is a cardinal right.<sup>62</sup>

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<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Officially the Act was the Official Language Act No 33 of 1956. See Neil DeVotta, *Blowback – Linguistic Nationalism, Institutional Decay, and Ethnic Conflict in Sri Lanka* (Stanford CA, Stanford University Press, 2004).

<sup>62</sup> B-10-5, Jennings Papers.

The reality meant that as the Rulers' counsel, Neil Lawson, put it 'There is only one cake, and they all want a bit of it, and the bigger the slice of cake one has, the less is left to the others'.<sup>63</sup>

## VII A Malayan Eastminster

As that early constitutional writer of independent Malaysia, RH Hickling, observed in 1991, the 1957 Constitution:

sought to reflect the basic principles of a Westminster-style parliamentary democracy. A Western lawyer reading that Constitution would suppose the reflection to be reasonably accurate; but further investigation would reveal that the reality is different from the appearance.<sup>64</sup>

Malaya was set, and determined, to be an *Eastminster*. This entailed forging a state 'that consciously had clear institutional and political resemblances to Britain's system, but with cultural and constitutional deviations from Westminster'.<sup>65</sup> The Malaya Eastminster case would display the all five of the key 'deviations' that an Eastminster regime holds – having an indigenous political elite often educated in Britain; heads of states in the form of Sultans that routinely interfered in political matters despite being constitutional non-executive heads; the legislature dominated by an overwhelming party in the Alliance with little parliamentary opposition and exclusive control of the executive; critical misgivings and issues regarding the rights of minority groups, especially vis-à-vis the privileged position of Malays; and finally critical continuities from the colonial period in the exercise of executive and emergency powers enabling the Tunku and his UMNO successors near unassailable authority over the state.<sup>66</sup>

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<sup>63</sup> CO 889/1

<sup>64</sup> Hugh Hickling, 'Malaysia' in David Butler and DA Low (eds.), *Sovereigns and Surrogates – Constitutional Heads of State in the Commonwealth* (London: Macmillan, 1991), at 206.

<sup>65</sup> H Kumarasingham, 'Eastminster – Decolonisation and State-Building in British Asia' in H Kumarasingham (ed.), *Constitution-Making in Asia: Decolonisation and State-Building in the Aftermath of the British Empire* (London: Routledge, 2016) 1–35.

<sup>66</sup> Ibid.

Charles Parkinson contends that the ‘minimalist bill of rights in the Malayan independence constitution stands as a failed experiment in producing bespoke bills of rights in countries with minorities problems’.<sup>67</sup> Nonetheless it was a considerable ‘innovation’ for English trained Commonwealth constitutional authorities like Jennings to recommend a Bill of Rights. Malaya was the first Colonial Office dependency to have a Bill of Rights, even though it was not the idea of the department. In common with many English legal scholars of the time Jennings saw bills of rights as restrictive and unnecessary devices. In 1952 Jennings provided a famous criticism of India’s constitutionally mandated fundamental rights.<sup>68</sup> However, by the time Jennings joined the Reid Commission his opinion was changing, especially with the perspective of watching the collapse of his constitutional progeny in Ceylon and Pakistan. The Bill of Rights that became Malaya’s own, as Jennings acknowledged, was greatly influenced by Malik’s experience in India and Hamid’s in Pakistan, and perhaps spoke of Jennings’ own patchy record on the device.<sup>69</sup> Jennings who had been constitutional adviser to the first Prime Minister of Ceylon and who effectively single-handedly framed that Constitution, was destined to witness, only a few years later, the failure of his broad non-discrimination clause in preventing the enactment of the Sinhala Only Act 1956, which made Sinhalese the sole official language and consequently catalysed ethnic riots.<sup>70</sup>

In Pakistan where Jennings had been constitutional adviser to the Constituent Assembly and later to the Governor-General in the mid 1950s, arguably contributed to the ease with which

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<sup>67</sup> Charles OH Parkinson, *Bills of Rights and Decolonization – The Emergence of Domestic Human Rights Instruments in Britain’s Overseas Territories* (Oxford: Oxford University Press, 2007) at 201.

<sup>68</sup> See Sir Ivor Jennings, *Some Characteristics of the Indian Constitution – Being Lectures given in the University of Madras during March 1952 under the Sir Alladi Krishnaswami Aiyer Shashitaahdapoothi Endowment* (Madras: Oxford University Press, 1953).

<sup>69</sup> B-10-7-3, Jennings Papers.

<sup>70</sup> See H Kumarasingham, *A Political Legacy of the British Empire – Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (London: IB Tauris, 2013) 171–201; and for Jennings’ role in Ceylon see H Kumarasingham, *The Road to Temple Trees – Sir Ivor Jennings and the Constitutional Development of Ceylon: Selected Writings* (Colombo: CPA, 2015)

rights and democracy could be suspended.<sup>71</sup> These experiences contributed to Jennings' different approach in Malaya where he constructively framed a Bill of Rights that openly drew on India's. Just prior to his death in 1965 he noted that his 1952 'criticisms were misconceived' towards India's Bill of Rights.<sup>72</sup> While the Malayan Bill of Rights was not as strong as scholars such as Parkinson and Harding would understandably prefer it to be, it was nevertheless an improvement on Jennings' previous attitude and approach. It was also an advance on contemporary legal mechanisms in practice across the British Empire and Commonwealth. This included open cross-Commonwealth borrowing from India, Pakistan, Ceylon, Burma, Ghana, South Africa, Newfoundland, Canada, Australia, New Zealand and Ireland.<sup>73</sup>

As Fernando argues, the publication of the Reid Commission's report on 20 February 1957 was greeted with attention surrounding the communal issues. Whereas, like many such experiences across the decolonising world, there 'was hardly any public discussion of the structure and function of government, the powers of the executive, the independence of the judiciary the "limited" functions of the Conference of Rulers or the merits or demerits of the Federal concept outlined in the Reid Report'.<sup>74</sup> The special status of Malays within the federation and Constitution was the issue that generated the most notice. For many Malays the Constitution needed to protect and promote their position and religion. While for the non-Malays like the Chinese and Indian communities there was critical concern that their language and communities would be reduced to a second-class rank. The predicament, therefore, facing the Reid Commissioners was to balance, what for most of them was the uncomfortable objective of providing special privileges for Malays, with the need to still create a democracy that did not diminish the rights of non-Malays. Malaya's constitutional history showed that at times, its constitutional development had been stunted under the British because of fears of

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<sup>71</sup> H Kumarasingham, 'A Transnational Actor on a Dramatic Stage—Sir Ivor Jennings and the Manipulation of Westminster Style Democracy: The Case of Pakistan' (2017) 2 *UC Irvine Journal of International, Transnational and Comparative Law* 33–56.

<sup>72</sup> Kumarasingham (n 29), at 280–281.

<sup>73</sup> H Kumarasingham, 'Eastminster – Decolonisation and State-Building in British Asia', p 10.

<sup>74</sup> Fernando (n 12), at 144.

excessive centralisation at the cost of the state interests and potential increased power for non-Malays.<sup>75</sup>

Responsible government par excellence was contained within the Alliance memorandum and its presentation to the Commission.<sup>76</sup> The preference for the flexibility an Eastminster provided was seen as a virtue. During the Alliance's meeting in late 1956 with the Commission, the MCA representative Ng Ek Teong ended the meeting by stating he 'wished the new Constitution be flexible as possible to encourage the growth of conventions'.<sup>77</sup> In a characteristic utterance Lord Reid on hearing a proposal pronounced: 'I would like to know how this would work because one does not want to recommend anything unless it can be worked'.<sup>78</sup>

The left-leaning and multi-cultural Labour Party in its memorandum to the Commission advocated a traditional Westminster state arguing for an independent judiciary and civil service, bicameral legislature, popularly elected lower house and a 'strong central government'. It even went so far as to recommend not only for Malaya the classic Westminster concept of parliamentary supremacy, but also wished to avoid, like the UK, the rigidities of a written constitution seen nowhere else in world bar New Zealand and Israel. Their recommendation on this issue bears repeating to illustrate the concerns and puzzles constitutional founding can evoke for those beyond the political and effective majority and, perhaps, lay out why constitutions are often discarded or replaced.

The Labour Party does not believe that a written Constitution for Malaya at this juncture can be anything but a temporary measure. While recognizing that a Federal form of Government has the sanction and approval of those allied with State interests and of those who are at the moment in political ascendancy, the Labour Party is of the opinion that a written Constitution must, to be effective in the flux of Malayan history, possess the elasticity and flexibility to meet the demands of economic developments, political progress and social change. A written Constitution must therefore be an instrument and a means for the building-up of a peaceful, progressive and democratic nation. To this end, the Labour Party cannot too strongly emphasise the need to avoid the rigidity that is characteristic of all written constitutions. The creators of a written constitution nearly always tend to obstruct, hamper, and restrict the

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<sup>75</sup> LA Sheridan, *Malaya and Singapore, The Borneo Territories – The Development of their Laws and Constitutions*, London: Stevens and Sons, 1961, pp 11–13.

<sup>76</sup> CO 889/2.

<sup>77</sup> CO 889/1.

<sup>78</sup> CO 889/6.



aspirations of future generations. The Labour Party therefore submits that in its present stage of development, Malaya should not be unduly subject to such constitutional fetters as a written Constitution must necessarily create.<sup>79</sup>

The Reid Commission presented its report on 20 February 1957. The Colonial Office tried to see the report in advance, but the Commissioners insisted on their independence, which played to their reason of deliberating in, and then printing their report from Rome. The Commission also found themselves being criticised by the Colonial Office in their official response. Jennings was not impressed:

The statement in paragraph 3 (of the White Paper) was at best maladroit, and in paragraph 53 the writer tries to teach his grandmother to suck eggs. I have drafted too many constitutional documents to care two hoots; but it is most unfortunate that such statements should be made by Her Majesty's Government about very distinguished lawyers in other parts of the Commonwealth.<sup>80</sup>

Lord Reid insisted to the Press that the Commission was not the creature of His Majesty's government, but jointly responsible to the Queen and Rulers:

We have never consulted Whitehall. One reason that we are to meet in Rome to draft our report is to avoid the impression that we would consult the British government. It will be our report and nobody else's.<sup>81</sup>

The tripartite negotiations followed where representatives of the Alliance, the Rulers, and the High Commissioner met 23 times between 22 February and 27 April 1957. Once again it was the special position of the Malays and the prerogatives of the Rulers, which caused the most discussion. However, largely, while there was strengthening of Malay privileges and some attempts from members within the MCA and MIC to derail the process as well as elements of disapproval of the communal bargain in Britain, the Malayan Independence Bill went forward in the British Houses of Parliament unchanged and ready for the anointed day of 31 August 1957.<sup>82</sup>

## VIII Conclusion

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<sup>79</sup> B-10-5, Jennings Papers.

<sup>80</sup> Jennings to Reid, 6 July 1957 in Fernando (n 12), at 180.

<sup>81</sup> *Straits Times*, 26 Oct 1956 in Fernando, *ibid*, at 115.

<sup>82</sup> See Fernando, *ibid*, at 143–188.

The Colonial Secretary, Alan Lennox-Boyd, assured Reid, who was worried that people might blame him or the Commission for any shortcomings of the last version of the Constitution after being amended by the Alliance:

If therefore anyone should feel that the final form of the Constitution falls short of perfection, responsibility for that lies not at the door of the legal draughtsmen but with the Malaysians who, for political reasons, felt that they had to force the pace. But you will know as well as I do that I could not say that in public.<sup>83</sup>

John Darwin argues that independence in 1957 caused ‘barely a ripple’ since through the Anglo-Malayan Defence Agreement of the same year the new government could call upon British military assistance against ‘internal subversion and external attack’. In addition, Malaya remained in the Sterling Area and agreed to maintain its commodities earnings in London’s dollar pool.<sup>84</sup> Colonial rule continued in North Borneo and Sarawak, while Singapore remained a critical defence base for British interests. It was not so much the end of empire as a ‘new phase of cooperation’.<sup>85</sup> Legally, the Privy Council remained a fixture in the Malaysian judicial hierarchy in part until 1985 despite, uniquely, not having the Queen as head of state. Harding believes that too much power was placed with the Executive and there were not enough innovations to deal with Malaya’s conditions and needs:

Jurisprudentially, this all smacks of a rather too executive-minded approach, arguable and no doubt fashionable at a time when communist insurgency was an ever-present threat (British legal advisers agreed with the Alliance view); but in the light of international opinion at the time and subsequent developments in Malaysia and elsewhere in the Commonwealth, outmoded, discredited and unsatisfactory as a blueprint for government in the advanced and sophisticated society Malaysia was to become.<sup>86</sup>

Whatever else, the demands on those tasked with the constitutional founding of the Malays were tremendous. The Tunku was critical to this founding and his faith in the British system. For Tunku Abdul Rahman the granting of an honorary doctorate in Law from Cambridge in 1960 despite ‘scraping through’ with his degree as a young student many years before, was a

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<sup>83</sup> Secretary of State to Lord Reid, 26 Sep 1957 in Fernando, *ibid.*, at 182.

<sup>84</sup> John Darwin, ‘British Decolonization since 1945: A Pattern or a Puzzle?’ in RF Holland and G. Rizvi (eds.), *Perspectives on Imperialism and Decolonization – Essays in Honour of A.F. Madden*, London: Frank Cass, 1984, p 201.

<sup>85</sup> *Ibid.*

<sup>86</sup> Harding (n 35), at 38.

major honour for this man who nostalgically appreciated his time in Cambridge and his learning of English principles of law.<sup>87</sup> Far from being just nostalgia this had a critical impact on Malaysia. HP Lee reflecting on 50 years of independence said that for Malaysia it was a ‘blessing’ to have ‘a leader who obtained his legal education in the homeland of the common law, who imbibed notions of the rule of law, the independence of the judiciary and the separation of powers’.<sup>88</sup> Lee argues that in many ways:

The lowering of the Union Jack and the raising of the flag of the new Federation 50 years ago on 31 August 1957 symbolised a change of constitutional order but not a change of that underpinning.<sup>89</sup>

Turning to its founding, Jennings observed in hindsight that the work of this unique Commission showed ‘...that, in the opinion of five lawyers trained in five different environments, it was possible to produce an agreed solution of the constitutional problems of a complex country... Our scheme, being quite original, is constitutionally very interesting, and the only expert who has so far commented on it in my presence went so far as to call it “ingenious”’.<sup>90</sup> This is debatable, but at the least it provided an extraordinarily influential Commission that framed the constitutional founding of the country, despite changes that the Alliance and later governments would make. As an editorial in the *Manchester Guardian* described after as *Merdeka* approached:

Whatever the criticisms which will be made in Malaya during the next few days, the Constitution looks, in final shape, an ingenious document for bringing democracy to a plural society. The three main communities can at least see the possibilities of a tolerable life under the system now offered to them.<sup>91</sup>

As with all constitutions, the true test would be if it worked in practice.

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<sup>87</sup> Chandran Jeshurun, ‘Tunku Abdul Rahman Putra and His Links with the Universities of Cambridge and Malaya, 1960-1962’ (2009) 82(1) *Journal of the Malaysian Branch of the Royal Asiatic Society* 1–15.

<sup>88</sup> HP Lee, ‘The Malaysian Constitution after 50 Years — Retrospective, Prospective and Comparative Perspectives’ (2008) 9(2) *Australian Journal of Asian Law* 301.

<sup>89</sup> Ibid.

<sup>90</sup> B-10-7-3, Jennings Papers.

<sup>91</sup> *Manchester Guardian*, 4 Jul 1957.